Supreme Court, U. S.
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80-978

*No.*

In the

# Supreme Court of the United States

WILBUR L. KEPHART,

*Petitioner,*

*vs.*

INSTITUTE OF GAS TECHNOLOGY,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## QUESTIONS PRESENTED

Whether the district court misapplied Rule 56 of the Federal Rules of Civil Procedure in granting summary judgment for defendant-respondent and misapprehended the use of the summary judgment device in an Age Discrimination in Employment Act (ADEA) case.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Wilbur L. Kephart, petitions for a writ of certiorari to issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 15, 1980.

## OPINION BELOW

The opinion of the court of appeals, not yet reported, appears in the Appendix hereto. It contains and incorporates by reference the opinion of the District Court for the Northern District of Illinois.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 15, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* and Rule 56 of the Federal Rules of Civil Procedure.

Section 623(a) states:

> It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

Section 626(c) states:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act. . . .

Rule 56 of the Federal Rules of Civil Procedure is included in the Appendix to this Petition.

## STATEMENT OF THE CASE

In 1976, petitioner filed this action under the Age Discrimination in Employment Act (ADEA) against his former employer, respondent, the Institute of Gas Technology (IGT), claiming that his discharge in 1974 and the refusal of IGT officials to provide recommendations to future employers constituted age discrimination. In addition, the petitioner alleged various claims under Illinois law, for defamation, breach of contract, and deprivation of economic opportunity. Petitioner had been employed as an econometrician for IGT, a private corporation which performed research for businesses in the petrochemical industry.

After discovery, IGT moved for summary judgment. Before the court were depositions of the petitioner and four IGT officials responsible for the discharge, documents concerning the age make-up of the various divisions at IGT, and affidavits from petitioner and others concerning petitioner's work performance. The district court granted the motion and dismissed the case, finding that since IGT officials "genuinely believed that [petitioner] . . . was not performing satisfactorily," petitioner had both failed to make a *prima facie* case, and, even if one was made, failed to rebut IGT's articulation of this legitimate reason for discharge.

Petitioner appealed, arguing that the district court either discounted or ignored evidence demonstrating good written evaluations of petitioner, evidence of more lenient standards applied by IGT to younger employees and statements of IGT officials indicating a preference for the younger employees, as well as conflicting statements

of IGT officials concerning the circumstances of petitioner's performance and discharge. The court of appeals affirmed stating its sole grounds were that IGT had been dissatisfied with his work and, therefore, had articulated a legitimate reason for its actions. The court apparently believed that petitioner's failure to present prior to trial direct evidence of pretext was fatal to his claim and justified summary judgment.

Petitioner believes the lower court judges have used and sanctioned the impermissible short-cut of summary judgment in disposing of a case which they did not believe was strong for petitioner. The lower courts weighed evidence which must be left to the finder of fact at trial and have encouraged summary disposal of discrimination cases when a subtle and sensitive factual inquiry at trial is necessary. This decision appears to conflict with every other court of appeals ruling on the use of summary judgment in ADEA cases. Each circuit, other than the one below, has consistently refused to permit at the summary judgment stage the weighing of such evidence or the imposition of the requirement of proof of a *prima facie* case or proof of rebuttal of the employer's assertions for its action in defense of the *prima facie* case.

Thus, this case presents to the Court an important question in the administration of discrimination cases and enables the Court to enunciate standards for the use of summary judgment as a vehicle for disposing of factual issues in discrimination cases.

Petitioner, born in 1927, was hired by IGT in 1972 as assistant director of the management sciences division after twenty years experience as a economist, computer expert and manager of various engineering projects for

Union Carbide Company and Bonner & Moore. William Bodle, director of management sciences division, then age 57, was his immediate supervisor.

Bodle, petitioner's supervisor, gave him the only written evaluations he received at IGT. On both occasions, 1973 and 1974, Bodle rated him "Good." Bodle, who worked with petitioner on a day-to-day basis, testified in deposition that he was aware of his work product and that, while he was aware of complaints made by an IGT official concerning a project known as the Columbia project, he knew of no complaints on other projects and stated that he believed him to be a good employee. The evidence demonstrates that no other IGT official worked as closely with petitioner as Bodle did and that Bodle was in the best position to evaluate his work product.

Petitioner also received salary increases for each year he was at IGT, and the second increase occurred just two months prior to his discharge. His salary increases were higher than those given to others holding positions comparable to petitioner.

Petitioner testified that other than criticism of his performance from Jack Huebler, a vice-president, who made comments on the first assignment he was given as an employee of IGT in 1972, the Columbia project, he received praise for much of his work, and stated in his deposition the projects he recalled for which he received praise. According to petitioner, the management sciences division grew while he was assistant director, and its revenues substantially increased as a result of his work in the division.

In August, 1974, petitioner received a memo, dated August 5, 1974, announcing a reorganization of the management sciences division. The division was to be

merged into the engineering research division under the direction of Robert Rosenberg, age 37. The memo further stated:

> Simultaneously, Will Kephart is being made a Senior Economist with principal responsibilities in preparing new program concepts. Much of the growth of Management Sciences will be dependent upon these new ideas.

Petitioner was told by Henry Linden, president of IGT, that he was not happy with the growth of the management sciences division and wanted to separate the responsibilities of Bodle and Kephart to evaluate both of them. Linden said Bodle's directorship was a "holding action" and that "[w]e obviously had no star at the time. Bodle was not a front line agressive manager. . . ." Bodle had suffered a number of heart attacks while he was director.

A month later, Rosenberg transferred Bodle to another division. Rosenberg stated that Bodle "was limited to his range of interests and in his physical ability to run that kind of division that IGT wanted run." When petitioner met with Rosenberg to receive his new assignments, Rosenberg told petitioner to continue with his work and that he would not give him any new assignments until he understood all the ongoing management sciences projects. Petitioner waited for new assignments from Rosenberg, but never received any, and Rosenberg killed many of his projects.

During the third week in November, petitioner returned from lunch and found a note on his desk from Rosenberg which stated: "How is the job hunting going? Well?" Petitioner went to Rosenberg and asked him

about the meaning of the note. Rosenberg stated that he had been told prior to the merger that petitioner was told to look for another job. Petitioner expressed disbelief and asked Rosenberg to go with him to talk to Linden about this matter. Rosenberg refused.

Petitioner then went to Linden himself and asked him to clarify his status. Linden told petitioner that Rosenberg must be mistaken and that he would take care of the matter. Four days later, Linden told petitioner that he had to let him go. No reasons were given for the termination except the statement: "There is just too much controversy here." Petitioner testified that he requested from Linden that they discuss this with Rosenberg and Huebler, but Linden refused.

Kephart never received a written or oral statement of the reasons for his termination, and there are no written warnings in petitioner's record. Linden testified that in the ordinary case at IGT an employee to be terminated is given a written notice stating the reasons for the action, and that a written file is kept of employees' problems which may lead to discharge. Petitioner's predecessor as assistant director of the management sciences division who had been discharged stated in an affidavit that he received a letter specifying the reasons for his discharge from IGT.

When petitioner applied for positions after his termination, he learned that prospective employers who contacted IGT were not given any information concerning the circumstances of his termination, that IGT officials would only talk in general terms and that with respect to one prospective employer, Linden refused to return telephone calls. David Cordell, an executive recruiter, who found petitioner "admirably qualified" for a

position at United Gas Pipeline Company after petitioner's departure from IGT, telephoned Linden to inquire about petitioner's tenure at IGT. Cordell testified about Linden's response:

> . . . . There was no direct answer to any one of my questions . . . It was very evasive. I don't think he was . . . I don't know he said he didn't know or didn't remember. It was more or less along those lines, but I never got a straight answer. I don't think he ever came out and said, "I don't know", but he inferred he didn't know. Let's put it that way. He was lot smoother. I don't know how you express that.

There are important contradictions in the testimony of Linden, Huebler and Rosenberg concerning the evaluation of the petitioner and the circumstances leading to his discharge. Rosenberg's criticism of petitioner that he gave a poor speech at a seminar was based on mistaken identity since the poor speech was given by another employee, not petitioner. Huebler's claim that the revenues of the management sciences division decreased during petitioner's tenure is contradicted by the affidavit of petitioner stating the amounts of revenue for each year and showing an increase for the division. The charge of Huebler that petitioner billed too many hours to a client for a project was contradicted by petitioner's affidavit that his time was not billed to any client but to overhead. While Rosenberg and Linden both testified that they did not consult prior to Rosenberg's note informing petitioner of discharge, Huebler testified that Rosenberg has sought his and Linden's approval for he discharge, which they gave. While Rosenberg testified that he was dissatisfied with the petitioner's on projects after the merger and reassignment, he could not

identify a single project or assignment performed by the petitioner. There are other similar gaps and contradictions in the testimony of IGT officials.

There is also evidence of perferred treatment of younger employees. Linden told petitioner that IGT preferred to hire persons under 40 like Rosenberg ". . . who are your marines who are going to do what you want. . . ." A summary of the investigation of the Department of Labor indicates that after petitioner's departure, IGT hired four economists, each under the age of 40. In addition, IGT admitted that three new employees were hired into the managment sciences division since petitioner's assignment as senior economist, all under 40 years old. Each person who was discharged on the professional staff from 1973 to 1975 was over 40 years old.

Seven employees were hired by Rosenberg as economic analysts into the merged engineering research division after Kephart's assignment as senior economist to Rosenberg, all of whom were under the age of 40. From IGT records the only person hired by Rosenberg into a management or senior staff position with economic duties since petitioner's departure was the age of 36. Rosenberg also gave promotions to persons aged 32, 35, and 29. There is evidence that younger employees with lower ratings than petitioner were later promoted by IGT.

There is evidence that 29 year old Nicholas Biederman eventually assumed many of Kephart's functions and was given favored treatment when compared to petitioner. Huebler admitted that there had been complaints lodged against Biederman and that he had urged that he be dismissed, as he had with petitioner. Linden also stated he believed at one time that Biederman's work was poor. Yet, Rosenberg, the man who fired petitioner after

his short tenure with him after the reorganization, urged Huebler to keep him on and requested the opportunity to supervise him directly. Huebler testified:

> . . . Nick was a very young man when he came to work for IGT. He went through many growing pains, as most college graduates do. He's a little of a beatnick. And during this period Nick was growing. And it was also during this period that, and I think he was in management sciences, when the decision was made to let him try the Algerian work, which we did. And, yes, he was in trouble with management sciences before he left because of his idiosyncracies. In Algeria, he had trouble with his supervisors.
>
> He's a cantankerous type of young man. When he came back I said, I'm going to fire him. Rosenberg said, please give him back to me. I think he's got the goods. And I said, okay, Rosenberg, he's yours. If you can make something out of him, great. He did make something out of Biederman, he made him a very, very productive individual out of him. That's all.

Rosenberg corroborated this testimony and admitted he told Huebler that he would be willing to take him on his staff "to try to make him come around". No such opportunities were given to petitioner.

## REASONS FOR GRANTING THE WRIT

The court of appeals sanctioned the dismissal of an ADEA case through summary judgment even though the record presented disputed questions of fact concerning the petitioner's work performance, the circumstances surrounding his discharge, preferred treatment of younger employees and contradictions in the testimony of witnesses. Despite these issues of fact, the lower courts found determinative petitioner's failure to refute the assertions of IGT that he was discharged for cause. Thus, the courts below have placed the impossible burden on plaintiffs in an ADEA case to prove a *prima facie* in response to a motion for summary judgment and to rebut at this stage the employer's assertions in response to the *prima facie* case, should they be made.

1. This unique approach to summary judgment in employment discrimination cases places the Seventh Circuit in conflict with other circuits. The First Circuit, in *Mack* v. *Cape Elizabeth School Board,* 553 F.2d 720. 722 (1st Cir. 1977), a Title VII case, adheres to a view diametrically opposed to the Seventh Circuit:

> A party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings. This is so even though, as a defendant, he would have no burden if the case were to go to trial.

The Third Circuit, in *Hicks* v. *ABT Associates, Inc.,* 572 F.2d 960, 967 (3d Cir. 1978), also a Title VII case, reversed summary judgment even though it could not bring itself to disagree with the lower court's assessment of the direction to which the overwhelming weight of evidence pointed:

> [T]he court referred to the facts given in plaintiff's deposition as being "only an accumulation of rumor, innuendo and conclusory allegation." Although in large part we agree with this characterization by the trial judge, we find that Hicks' deposition does contain some facts which could support a claim of race and sex discrimination. As in all summary judgment motions, all doubts as to the existence of material facts should be resolved against the movant.

In *McCorstin* v. *United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), the Fifth Circuit reversed a directed verdict for the employer when the employer asserted below that the plaintiff was discharged because of his incompetence and the need to reduce the workforce and presented written evaluations of the plaintiff which stated his work was poor, including a survey which rated plaintiff as the lowest of the 42 employees in his category. Nonetheless, the court held that this proof, on motion for directed verdict after the presentation of plaintiff's case at trial, did not foreclose the possibility that age may have been a motivating factor in the decision to terminate and therefore remanded for a new trial. In the case at bar, the court was not faced with a motion for directed verdict after hearing oral testimony during trial but summary judgment and applied more stringent requirements on petitioner.

In another Fifth Circuit opinion, reversing an award of summary judgment, *Hayden* v. *First National Bank of Mt. Pleasant, Texas,* 595 F.2d 994, 996 (5th Cir. 1979), a Title VII case, the district judge had the benefit of oral testimony by the parties and, unlike the district court in the instant case, was in a position to assess the credibility of the witnesses. In his opinion the judge made it clear that he saw no merit in the plaintiff's allegations:

> It is obvious from the evidence that the Court has heard that there is no discrimination against the plaintiff in this case on the basis of race or sex. In fact, the Court feels that it is rather a trivial and insignificant claim that is being made. The Court is surprised that the suit was filed in the court, but, of course, parties have a right to file suits.

Nevertheless, the Fitfh Circuit reversed, holding that issues of credibility and veracity are foremost in employment discrimination cases and the weighing of evidence by the district judge was improper on a motion for summary judgment.

The Ninth Circuit is in agreement that even a "substantial" showing of just cause for termination does not negate the possibility of discrimination:

> Rand made a substantial showing in support of its motion for summary judgment, demonstrating that business conditions necessitated a general reduction in the work force, that the primary impact of the reduction was not on older employees, and that management personnel had been dissatisfied with Haydon's job performance. We think, however, that Haydon has presented a material factual dispute concerning the question whether Rand's dissatisfaction with Haydon's work was merely a pretext to conceal a motive to discriminate against him because of his age.
>
> *Haydon* v. *Rand Corp.*, 605 F.2d 453, 454-55 (9th Cir. 1979)

In direct contrast to these cases, the Seventh Circuit required petitioner to prove his *prima facie* case and to rebut the employer's defense to the *prima facie* case, all on paper and without the benefit of oral testimony which may have presented demeanor and credibility issues. Petitioner has presented evidence of favorable eval-

uations, salary increases and has responded to the claims of poor performance in counter affidavits and his deposition. In addition, conflicts in the deposition testimony of IGT witnesses exist as does evidence indicating that the official who discharged petitioner favored younger employees and that his performance was not inferior to other younger employees who were later promoted because they appeared younger, more loyal and aggressive.

These matters raise disputed issues of fact which the court of appeals ignored in ruling that the petitioner was required to meet the initial burden of proving a *prima facie* case on paper and to rebut the the employer's response to the *prima facie* case.

2. Both lower courts engaged in impermissible weighing of credibility issues and determined questions involving the employer's intent and motivation. Both lower courts recognized that intent and motivation are determinative. The district court plainly recognized that the issue of motivation was key when it identified the fundamental question before it to be "whether the employer *genuinely believed* Kephart was not performing satisfactorily [emphasis added]." The court of appeals acknowledged this approach when it held that unsatisfactory performance meant unsatisfactory "as evaluated by the employer," a decision "not to be second guessed by the court". The credibility of IGT's after-the-fact and self-serving criticisms of petitioner's work performance—criticisms flatly contradicted by contemporaneously prepared favorable evaluations of petitioner and salary increases —cannot be determined by affidavit and deposition testimony not subject to formal cross-examination.

Courts which have reviewed summary judgment involving issues of motivation and intent in employment

discrimination cases have prohibited its use in resolving these issues. In *Hayden,* 595 F.2d at 997, the Fifth Circuit stated that ["w]hen dealing with employment discrimination cases, which usually and necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party, granting of summary judgment is especially questionable." The Third Circuit in *Hicks,* 572 F.2d at 968, also refused to permit summary judgment on the motivation issue in employment discrimination cases and stated:

> [N]either of these issues can be resolved on the record as it now stands. They involve questions of the veracity of Hicks' testimony, an issue which only rarely is appropriate for summary judgment, *see Ettinger* v. *Johnson,* 556 F.2d 695, 697 (3d Cir. 1977), and of defendants' motivation, an issue which itself often turns on the credibility of witnesses.

The Fifth Circuit explained:

> It is possible that in the presentation of the employer's case, further evidence relating more directly to the requisite specific intent might be adduced during cross-examination by this Appellant . . . [which] can only be judged from viewing the evidence as a whole . . . [A]ppellant's case called for no more and no less than a hearing of all the evidence.

*Wilson* v. *Sealtest Foods Division of Kraftco Corp.,* 501 F.2d 84, 86-87 (5th Cir. 1974). Accord: *Bonham* v. *Dresser Industries, Inc.,* 569 F.2d 187,195 (3d Cir. 1977).

To allow summary judgment on the grounds that it is enough for the employer merely to state dissatisfaction with an employee's performance reverses the plaintiff's burden of proof in an ADEA case. Until now, it had generally been held that "[e]ven if more than one factor affected the decision to discharge [plaintiff] . . . he could nevertheless recover if one factor was his age and it in

fact made a difference in determining whether he was to be retained or discharged." *Laugesen* v. *Anaconda Company,* 510 F.2d 307, 310 (9th Cir. 1975), *cert. denied* 95 S. Ct. 2665 (1975). The decision below, however, requires the plaintiff to prove that age was the *only* factor affecting the decision to terminate. For it can hardly be said to be logically inconsistent for an employer to believe that several of his employees are not wholly satisfactorily, yet be influenced by age in deciding which ones will be terminated.

Petitioner has proffered substantial evidence tending to cast grave doubt on the veracity of IGT's self-serving, after-the-fact deposition testimony. This is all that a plaintiff can be realistically expected to show at the close of discovery. He cannot be asked to expose the defendant's state of mind and extract an admission of prejudice or discrimination. The upshot of the decision below is to require every plaintiff to produce a "smoking gun" during discovery.

This Court should grant the writ in order to enunciate standards for the district courts in weighing these difficult issues in ADEA cases.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-2536

WILBUR L. KEPHART,

*Plaintiff-Appellant,*

*v.*

INSTITUTE OF GAS TECHNOLOGY,

*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-2594—Bernard Decker, Judge.

ARGUED MAY 6, 1980 — DECIDED SEPTEMBER 15, 1980

Before PELL, *Circuit Judge,* NICHOLS, *Associate Judge,** and CUDAHY, *Circuit Judge.*

PER CURIAM: Plaintiff Kephart is an individual. This is not a class action. He is apparently an economist by training and profession. Defendant, hereinafter IGT, despite its name, is a profit-making business organization, which performs (we suppose normally in a consultant relationship), energy-related research for the government and private industry. Defendant employed plaintiff in June 1972 at his then age of forty-four as its Director of the Management Sciences Division. It discharged him in November 1974 at the age of forty-seven. He sued in district court alleging a violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 and ff. The district judge dismissed on motion because he had not given

* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

a 180 day notice, but this court held the requirement was not jurisdictional and reversed. 581 F.2d 1287 (1978). The opinion states that the Act should be liberally interpreted to effectuate its purpose to end age discrimination in employment, but its contents do not otherwise affect the present controversy. The district court allowed extensive discovery, upon the completion of which defendant moved for summary judgment again, and the district judge granted the motion and dismissed the complaint. Our problem is to determine whether such a dismissal on summary judgment was proper. Certain state law claims asserted under pendent jurisdiction were also dismissed, but these are not before us and we do not consider them. We determine that the summary judgment was properly granted and we therefore affirm.

We read the district judge's Memorandum Opinion and Order, which is attached to and made a part of this opinion, as holding that the plaintiff's special factual allegations and proffers of proof, as distinguished from his conclusory allegations, do not present a triable issue of fact. The district judge necessarily, in view of his decision, rejected plaintiff's conclusion that IGT had a policy of discriminating against the aged, but he accepted at least *arguendo* all the subsidiary facts plaintiff put forward as evidence to support his assertion. Summary judgment is improper in a discrimination case—or any other—if it involves—as it often must—any weighing of conflicting indications of motive and intent. Here plaintiff had no indications of motive and intent, supportive of his position, to put on the scales for weighing. It was a wholly empty case. In such circumstances, summary judgment is proper.

We regret, however, that the parties did not put before this court, nor does the district judge, more specific information as to the nature of defendant's business, the nature of plaintiff's duties in that business, and the nature of the qualifications his job or jobs required. (He was shifted from one slot to another during his employment.) We gather by inference from the findings and facts of

record that the business of defendant was consultancy and research in support of energy-related government and private business. We gather it was small and informally run. It had no direct labor force, nor did it produce, sell, or deliver materials. One might almost call it a "think-tank." Plaintiff for his first two years was Assistant Director of Management Sciences, a high level position that involved hiring and firing, supervision of the work of others, contacts with clients, and to some degree at least, getting and keeping business. The name of the division suggests that its work was efficiency or management engineering. In employing an outside "think-tank." companies and federal agencies often are influenced by what they know about the employee who will work to solve their problems. In August 1974, the Management Sciences Division was merged into the Engineering Research Division, under one Robert Rosenberg. Kephart was demoted in rank (but apparently not in pay) to senior economist, and relieved of all management responsibilities. From then on he got no new work, several projects he was already working on were killed, and he was advised to look for other work. He was allowed a decent interval, after which he was discharged. Top officials in IGT had long been dissatisfied with Mr. Kephart, as was Columbia Gas Systems, a major integrated natural gas producer, for whom IGT, through Mr. Kephart, was doing an important study.

No reference is made to any written job descriptions and we gather there were none. There was no written evaluation of an employee's performance except one of the most summary description when he was considered for a salary raise. Mr. Kephart got one wherein the evaluation said his work was "good" but the evaluator made clear in deposition testimony that he meant only satisfactory. Other top level employees got better raises at that time. It is clear that management expected to and did move persons in and out within the organization and on and off the payroll with perfect freedom according to how useful it appeared they were to the company in light of its then mix of business and how successful they were in pleasing the clients.

The district judge cited and relied on the classic formula in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) which prescribes a prima facie case for the aggrieved employee to make in a discrimination case. It involves four elements, one of which is that he was qualified for the job he sought. In case of a discharge, the employer's experience with him is the best test of that. If the prima facie case is made the burden shifts to the employer to "articulate" a valid reason other than the protected characteristic for not hiring (or for firing). Of course, unsatisfactory performance is the best of reasons, and the district judge construed this to mean unsatisfactory as evaluated by the employer a decision, if not a mere pretext, not to be second guessed by the court. The district judge well analyzes the case and we need not duplicate his effort as we incorporate his opinion in ours. He seems to hold that plaintiff did not make a prima facie case, but even if he did, dissatisfaction with his work and valid reasons for it were "articulated." We agree.

As regards the element of qualification in the prima facie case, we say a word more. In the case of a company like IGT, with the personnel practices that appear in this record, how do you decide who is qualified? Presumably Mr. Kephart's degrees in economics do not ipso facto qualify him, nor does the fact that IGT once hired him. Qualification obviously depends on the nature of IGT's business at any given time. One year an outgoing business-getter type might be best qualified, while in the next, after the business was got, it might be a cloistered scientist or mathematician. To ignore the shifting nature of qualification from time to time would make the qualification requirement meaningless and would encourage the harassment of small businesses having informal personnel practices, with unfounded suits. It is an obvious purpose of the Supreme Court in *McDonnell, supra*, and still more in *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978) to make the allocation of burden of proof responsive to the need to stop unsupported and malicious suits short of the necessity for a full dress trial. The district judge's use of summary judgment and his application of these burden of proof rules are sensitive

and accord with law. He had, however, support in the record for squarely holding that the prima facie case was not made because plaintiff was not, on the date of his dismissal, "qualified" in the sense the formula requires, *i.e.*, his work was not satisfactory to his employers for reasons articulated by them, related to his capabilities, and unrelated to his age.

We note that plaintiff could and did depose defendant's top officials. Where extended depositions are taken, much of the strain in the resources of a party, that a full dress trial would require, has already been imposed. The purpose of summary judgment is to that extent frustrated. It may be that in the development of a case such as this it will be necessary to depose company officials in the search of a prima facie case before summary judgment, whenever the employer is a small private outfit that does not maintain a separate personnel department nor the elaborate rules, rituals, forms, regulations, procedures, reports, documents, and records, that characterize the personnel management of large companies and the government. The presence of these things will at least narrow the scope of inquiry by oral testimony and the ratio of company officials to be interrogated, compared to the whole number. This is one of the many drawbacks a company will have to incur under our present day laws because of being small, but no doubt it enjoys some advantages too. At any rate, the district judge has the right and duty to police the use of depositions for mere fishing expeditions and to favor the development of relevant facts by less costly means. We note plaintiff complains that the depositions were useless to him without the right of cross-examination at trial being accorded besides. Apparently he followed the common practice of just getting the deponent's stories and not trying to shake them. We do not find this a sufficient reason for not deciding the case on summary judgment.

The district judge's opinion and order are attached hereto and incorporated by reference in this opinion.

AFFIRMED.

## APPENDIX

## MEMORANDUM OPINION AND ORDER

Wilbur L. Kephart, a former employee of the Institute of Gas Technology (IGT), brought this claim of age discrimination against his former employer. He alleges that his termination by IGT and its refusal to provide recommendations to future employers violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*, and violated Illinois law. Defendant has filed a motion for summary judgment.

Extensive discovery has been taken in this case, making it possible to set out the facts not in dispute with confidence. Kephart was hired in June 1972 as Assistant Director of the Management Sciences Division of IGT. He was then 45 years old. His first assignment was as project manager on a study of gas allocation for the Columbia Gas System. It is uncontroverted that this project was not completed on time and that certain of Kephart's superiors were dissatisfied with his performance on it. Kephart's own version of his experience on this project, which the court will accept as true, describes it as an "education". He felt that the project could not be completed in time for the amount of money projected, and disagreed with what he thought was IGT's approach to research, which was "to do as much research activity within a given general area until all that money was spent and they would go back and say, 'Here's the results we found to date. Now if you want us to do more, give us more money.'" There is no dispute as to the fact that conflicts developed between Kephart and his employer as a result of this project.

Other IGT employees made complaints about Kephart's performance on other projects during the two years he was Assistant Director of Management Sciences. Kephart was aware at the time of these complaints and knew that his superior, Jack Huebler, was dissatisfied with his performance. Although one complaint, about Kephart's pres-

entation at a meeting, was, according to Kephart, based on a misunderstanding, it remains the case that at least one of Kephart's superiors was dissatisfied with what he thought had been a poor presentation at that meeting

For each of the two years Kephart was an assistant director, he received a performance evaluation of "good". However, the person who made this evaluation, William Bodle, said that he thought Kephart was incompetent in some ways, that his work "left something to be desired," and that his work on the Columbia Gas project was "poor". Kephart also received a raise each year, though these raises were smaller than those given to almost all other members of the administrative staff.

In August, 1974, the Management Sciences Division of IGT was merged into its Engineering Research Division under the direction of Robert Rosenberg. Kephart was told at the time that there was dissatisfaction with the performance of the Management Sciences Division. He was demoted in this reorganization to the position of senior economist, and was relieved of all management responsibilities. Rosenberg did not give Kephart any new projects, and killed several of the projects Kephart had been working on. In November, Rosenberg left a note on Kephart's desk saying, "How is the job hunting going? Well?" Kephart claims that this was the first time he was informed that he had been expected to leave IGT.

Kephart did have advance warning, though, that he had been given six months to improve or he would have difficulty in retaining his job. Plaintiff does not contradict the testimony of Dr. Henry Linden, the Executive Vice President and Director of IGT, who states that he told Kephart prior to the August reorganization that he was being given six months to perform better, nor does plaintiff contest the testimony of Robert Rosenberg, who viewed the six month period as an "arrangement" leading to Kephart's discharge. Kephart was aware during the last months of his employment that it was important for him to prove himself. In his deposition

at p. 163, he states, "I was working what I would call defensive action. I was trying to do what I could do to maintain my credibility, my professional credibility. Because, before I could go out and put my resume on the streets, I had to have some accomplishments."

Immediately after receiving the note from Rosenberg, Kephart talked to Linden who, Kephart claims, thought the note was a mistake. Four days later, however, Linden informed Kephart that he was to be terminated, stating that "There is just too much controversy about you here." Kephart was given an official notice of termination shortly thereafter.

After the reorganization of IGT, no one assumed all of the duties Kephart had performed as assistant director. However, several younger economists were hired after Kephart's termination to perform less important functions. Plaintiff asserts that younger men were given preferences in promotion as well as in hiring. He points to the treatment of Nick Biederman as an example. Though complaints had also been lodged against Biederman on several early projects, he was turned over to Rosenberg to be given another chance. This treatment was justified by Kephart's superior, Jack Huebler, by the fact that Biederman "was a very young man when he came to work for IGT. He went through many growing pains, as most college graduates do. He's a little of a beatnik." Rosenberg intended to make something out of Biederman, and did so. He apparently had no intention of giving Kephart another chance to improve, viewing the demotion as an "arrangement" leading to Kephart's discharge. At best, Rosenberg thought it highly unlikely that Kephart would improve sufficiently to justify his remaining with the company more than six months after the reorganization.

Plaintiff has also produced statistical evidence from an investigation by the Department of Labor showing that of the three people on the professional staff discharged between 1973 and 1975, all were over the age of 40. Most of those hired during that time were under

40. Kephart also states, as indicative of IGT's attitude, that he was told by Linden while he was an assistant director, that he should "act like what Rosenberg does, and that is to hire young people who are your marines who are going to do what you want and who are going to begin to work your problems for you. That's how I got the message that I should go after young people and train them to where they will work for me and be loyal to me." Kephart also stated that he was not allowed to hire a man with 20 years experience because "his technology was too old."

Plaintiff's burden of proof in an age discrimination case is to show that age was a factor in the decision to terminate him. Age need not have been the sole motivating factor but it must have been the " 'determining factor' in his discharge in the sense that 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged." *Loeb* v. *Textron,* 600 F.2d 1003, 1019 (1st Cir. 1979). The courts have generally applied the order of proof test established in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). In *Green,* the Supreme Court held that a Title VII plaintiff carries the initial burden of establishing a prima facie case of intentional discrimination. He may do so by showing that he belongs to the group allegedly discriminated against, that he was qualified for the job he sought, that he was not hired, and that the employer continued to seek applications for that position. *Id.* at 802. After this showing, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* The Supreme Court has recently made it clear that it is not the employer's burden to *prove* the absence of discrimination, only to state a legitimate reason for the refusal to hire. *Board of Trustees of Keene State College* v. *Sweeney,* 47 U.S.L.W. 3330 (Nov. 13, 1978). After the employer has articulated a justification, the burden shifts back to the employee to prove that this reason was merely a pretext for the alleged discrimination. 411 U.S. at 804.

While the Sixth Circuit has held that the *Green* guidelines should not be simply borrowed and applied automatically in age discrimination cases, *Laugesen* v. *Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975), the courts have generally spelled out the requirements of a prima facie case with only slight variations on the *Green* theme. For example, the court in *Wilson* v. *Sealtest Foods Division*, 501 F.2d 84 (5th Cir. 1974), found that plaintiff had stated a prima facie case by showing that he was within a protected class, was doing "apparently satisfactory" work, was asked to take early retirement against his will, and was replaced by a younger person. Similarly, in *Loeb* v. *Textron, Inc.*, 600 F.2d at 1014, the plaintiff was held required to prove "that he was in the protected age group, that he was performing his job at a level that met his employer's legitimate expectations, that he nevertheless was fired, and that [the employer] sought someone to perform the same work after he left." The *Laugesen* court, on the other hand, stated that the plaintiff's burden is simply to "prove his claim that he was discharged because of his age." 510 F.2d at 313. And the Tenth Circuit, in *Toussaint v. Ford Motor Co.*, 581 F.2d 812, 815 (10th Cir. 1978), stated that "the plaintiff must prove more than simply the fact that he was within the protected age group and that he was adversely affected by a decision of management relating to conditions of employment."

Plaintiff cannot dispute that his employer has articulated a legitimate reason for his dismissal. His arguments address the question whether the employer will be able to *prove* that its reasons were legimate. The Supreme Court indicated in *Sweeney* that it regards the distinction as an important one. The court finds, therefore, that the employer's burden of rebutting the plaintiff's prima facie case has already been satisfied. The plaintiff, in addition to stating a prima facie case, must also show that IGT's stated reasons for firing him were mere pretexts for discrimination due to age. He must show that had it not been for his age, he would not have been fired.

The court must now determine whether there are material issues of fact remaining on these elements of plaintiff's case: whether plaintiff was in fact performing his work satisfactorily; whether his employer sought others to perform the work plaintiff had been doing; and whether the employer genuinely believed Kephart was not performing satisfactorily or was using this reason as a pretext for age discrimination.

According to the test formulated by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d at 1014, the plaintiff must show as part of his prima facie case only that he "met his employer's *legitimate* expectations". This formulation raises the question whether the plaintiff would be permitted to show that the employer's demands were illegitimate in the sense of being unfair or arbitrary. Plaintiff's assertion that the company's goals in the Columbia Gas project were unrealistic or constituted an approach to research that Kephart considered unsound might be relevant under this approach.

The Age Discrimination in Employment Act, however, was not intended as a vehicle for judicial review of business decisions. *See Havelick v. Julius Wile Sons & Co.*, 445 F. Supp. 919, 926 (S.D.N.Y. 1978). The question before the court is not whether the company's methods were sound, or whether its dismissal of Kephart was an error of business judgment. The question is whether he was discriminated against because of his age. Although an employer may not make unreasonable expectations, and must make the employee aware of just what his expectations are, beyond that the court will not inquire into the defendant's method of conducting its business. If Kephart was not doing what his employer wanted him to do, he was not doing his job. The plaintiff admits that conflicts developed between himself and his superiors as to how projects should be carried out. He does not contradict the affidavits and depositions of other IGT employees stating that they thought his work was unsatisfactory. In response, he offers only the judgments of some who thought his work was good. These contrary assessments of his performance do not impeach the legitimacy of his em-

ployer's expectations. Plaintiff does not raise a material issue of fact on the question of the quality of his work merely by challenging the judgment of his superiors.

On the second question, whether the employer sought younger people to perform Kephart's job, Plaintiff has presented documents showing that several new younger economists have been hired by IGT. Although these new employees did work that Kephart could have done, there is no showing that they did work that he was supposed to do either as assistant director or as senior economist. Kephart's was a position of more responsibility than appears to have been given to the new economists. In addition, plaintiff admits that the administrative responsibilities he had as assistant director were taken over by Glenn Seay, who was older than Kephart.

There are thus insufficient facts in dispute that would permit a finding that plaintiff has made a prima facie showing of age discrimination. Uncontradicted evidence reveals that he was not living up to his employer's expectations, and that he was not replaced in his particular position by persons younger than himself. Assuming arguendo that plaintiff could satisfy the initially required showing, the question would still remain whether his employer genuinely believed that he was not porforming satisfactorily, thus negating any inference that the reasons given by IGT were pretextual.

Kephart himself has stated that there were three primary reasons for his discharge: First, he felt that "special interests" did not want certain of his projects done; second, he thought there were people in IGT who were opposed to its having a Management Sciences Division; and finally, he thought that age played a role.

When asked about the reasons for age discrimination at IGT, Kephart stated that the company wanted people with less experience so that it would be able to control the way they performed projects. The company was looking for people who were, in Kephart's words, "impressionable and very good technically." Thus, Kephart's own state-

ments reveal that the company's discrimination was not so much against age as against experience and independence. The statement by Linden relied on by plaintiff, that he should hire young people because they would do what he wanted, also reveals that the company prized loyalty as much as youth.

Even if the court accepts the argument that the company's bias against the independent-minded had a disparate impact on employees over the age of 40, that does not provide a basis for a finding that this particular plaintiff would have been retained, if he had been under 40. Aside from these few statements by IGT officials indicating a preference for the impressionable, only the statistics on hiring and promotion support Kephart's claim that the reasons given for his discharge were pretextual. These statistics, while of some aid in showing discriminatory intent, are not significant in age discrimination cases unless the disparities in treatment are quite large. *See Morelock v. NCR Corp.*, 586 F.2d 1096, 1107 (6th Cir. 1978); *Mastie v. Great Lakes Steel Corp.*, 424 F.Supp. 1299, 1319-20 (E.D. Mich. 1976). The reason such evidence is of little value in assessing discriminatory intent was explained by the court in *Laugesen v. Anaconda Co.*, 510 F.2d at 313: "It is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in." Moreover, the statistical evidence relied on by plaintiff is contradicted by personnel cards produced by defendant showing that most of the employees on Rosenberg's senior staff were over 40.

In short, even were there a dispute in this case about whether Kephart's work was good; there is no dispute about the fact that some of Kephart's superiors did not think his work was good. As to whether his employer's dissatisfaction was a pretext for discrimination, plaintiff has introduced no documents to justify a finding that any age discrimination existed in his case.

Summary judgment may not often be an appropriate means of resolving a question as elusive as the existence of discriminatory intent. Indeed, the court in *Wilson v. Sealtest Foods Division*, 501 F.2d at 86 went so far as to find that a directed verdict for an employer was improper where, "[i]t is possible that in the presentation of the employer's case, further evidence relating more directly to the requisite specific intent to discriminate might be adduced during cross-examination by the Appellant." However, this cannot be taken to mean that a directed verdict or summary judgment is never an appropriate means to resolve age discrimination cases. Indeed, summary judgment was granted in a case such as this one in *Brennan v. Reynolds Co.*, 367 F.Supp. 440 (N.D.Ill. 1973). Plaintiff tries to distinguish *Brennan* by saying that the reasons given for the dismissal in that case were formulated contemporaneously, while those in this case are merely belated justifications. However, in this case there are the facts, in addition to subsequently stated justifications, that Kephart was demoted immediately prior to his termination, for reasons unrelated to his age, and that he was informed of dissatisfaction with his work.

In this case, unlike *Wilson*, plaintiff has not established a prima facie showing of discrimination. He should not, in such a case, be permitted to rely on the hope that he will be able to develop evidence on cross-examination of his opponent's witnesses. This is especially true where, as here, the party opposing the motion for summary judgment has already had a chance to examine the movant's witnesses at their depositions. Under such circumstances, it is not unfair to grant summary judgment if no other evidence has been introduced indicating that their testimony is untrue *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (2d Cir. 1943).

Plaintiff has failed to meet his burden of showing that there is a genuine issue of material fact remaining for trial. Defendant's motion for summary judgment is therefore granted. In view of the dismissal of plaintiff's fed-

eral claims, there is no longer pendent jurisdiction over his claims under state law. These, too, are dismissed.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: November 19, 1979.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B

Rule 56.

SUMMARY JUDGMENT

(*a*) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(*b*) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(*c*) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(*d*) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by inter-

rogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(*e*) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(*f*) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(*g*) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.